

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the **Matter** of the Appeal of)
ERIC KOLENKO)

For Appellant: Eric Kolenko,
in pro. per.

For Respondent: James T. Philbin
Supervising Counsel

O P I N I O N

This appeal is made pursuant to section 18593 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Eric Kolenko against a proposed assessment of additional personal income tax and penalty in the total amount of \$3,433.50 for the year 1979..

Appeal of Eric Kolenko

Appellant filed a California personal income tax return for 1979 which provided no information concerning his income, deductions, or credits. In the spaces provided for this information, appellant wrote "Object--self incrimination." Respondent informed appellant that the return he filed was not a valid return and demanded that he file a return containing the necessary information. When appellant did not respond to this demand, respondent issued a proposed assessment based upon information received from the California Employment Development Department and several financial institutions. Respondent imposed 25 percent penalties for failure to file a return and failure to file after notice and demand. After considering appellant's protest, respondent affirmed the proposed assessment, and this timely appeal followed.

Appellant's primary contention is that the Fifth Amendment excuses his refusal to file a valid return. This board cannot decide this issue because we have a policy of abstention from deciding constitutional issues in appeals involving deficiency assessments. (Appeals of Fred R. Dauberger, et al., Cal. St. Bd. of Equal., March 31, 1982.) Were we able to decide this question, however, we would conclude that the Fifth Amendment privilege does not encompass the total refusal to file an income tax return or to provide financial information. (See, e.g., United States v. Daly, 481 F.2d 28 (8th Cir.), cert. den., 414 U.S. 1064 [38 L.Ed.2d 469] (1973).)

The other arguments raised by appellant have been considered by this board and found to be without merit. (Appeals of Fred R. Dauberger et al., supra.) The burden of proving respondent's determinations to be erroneous is on the taxpayer. (Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Since appellant has produced no evidence to prove respondent's determination to be incorrect, we must sustain respondent's action.

Appeal of **Eric** Kolenko

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor;

IT IS HEREBY ORDERED, 'ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Eric Kolenko against a proposed assessment of additional personal income tax and penalty in the total amount of **\$3,433.50** for the year 1979, be and the same is hereby sustained.

Done at Sacramento, California, this 4th day
of May, 1983, by the State Board of Equalization,
with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg
and Mr. Nevins present.

William M. Bennett, Chairman

Conway Li. Collis , Member

Ernest J. Dronenburg, Jr. , Member

Richard Nevins, Member

_____, Member